No. 02-1606

In The Supreme Court of the United States

TENNESSEE STUDENT ASSISTANCE CORPORATION,

Petitioner,

v.

PAMELA L. HOOD,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF PETITIONER

PAUL G. SUMMERS
Attorney General & Reporter
for the State of Tennessee

MICHAEL E. MOORE
Solicitor General

DARYL J. BRAND
Associate Solicitor General
Counsel of Record

CYNTHIA E. KINSER
Deputy Attorney General

MARVIN E. CLEMENTS, JR.
Senior Counsel
P.O. Box 20207
Nashville, TN 37202-0207
(615) 253-3327

Counsel for Tennessee Student Assistance Corporation

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether Congress has the authority to abrogate state sovereign immunity under the Bankruptcy Clause, U.S. CONST. art. I, § 8, cl. 4.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The opinion of the court of appeals is reported at 319 F.3d 755 (6th Cir. 2003). [Pet. App. 1-26][1] The opinion of the bankruptcy appellate panel is reported at 262 B.R. 412 (B.A.P. 6th Cir. 2001). [Pet. App. 27-60] The opinion of the bankruptcy court is reported at 2000 WL 33965623 (Bankr. W.D. Tenn., July 24, 2000). [Pet. App. 62-81]

JURISDICTION

The court of appeals entered its judgment on February 3, 2003. No party sought rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Bankruptcy Clause of the Constitution grants the following power to Congress:

> To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States.

U.S. CONST. art. I, § 8, cl. 4.

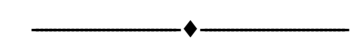
Bankruptcy Code, 11 U.S.C. § 106 provides in pertinent part:

[1] The Appendix to the Petition for Writ of Certiorari, filed on May 2, 2003, is cited as "Pet. App." followed by the page number.

> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
>
> (1) Section[ ] . . . 523 . . . of this title.

Bankruptcy Code, 11 U.S.C. § 523 provides in pertinent part:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –
>
> . . .
>
> (8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.



STATEMENT OF THE CASE

Between July 1988 and February 1990, Pamela Hood ("the Debtor") signed promissory notes for student loans guaranteed by the Tennessee Student Assistance Corporation ("the State" or "TSAC"). [Pet. App. 29] TSAC is a governmental corporation created by the Tennessee legislature to administer student assistance programs authorized by law to guarantee student loans under the provisions of the federal Higher Education Act of 1965, as amended. TENN.

CODE ANN. §§ 49-4-201, *et seq*.; TENN. CODE ANN. § 49-4-401.

On February 26, 1999, the Debtor filed a "no asset" Chapter 7 bankruptcy in the United States Bankruptcy Court for the Western District of Tennessee, Western Division. [Pet. App. 29] Sallie Mae Service, Inc. ("Sallie Mae"), submitted a proof of claim to the bankruptcy court, which it subsequently assigned to the State. However, the State did not itself ever file a proof of claim in the bankruptcy case. [Pet. App. 6, 29]

The Debtor received her general discharge on June 4, 1999, without addressing her student loans. She subsequently reopened the case on September 14, 1999, and on October 14, 1999, she filed a complaint seeking a hardship discharge under 11 U.S.C. § 523(a)(8), naming the United States of America, its Department of Education and Sallie Mae, as defendants. On February 22, 2000, the Debtor amended the complaint to add TSAC as a defendant. At the time she filed the complaint, the Debtor owed the State $4,169.31. [Pet. App. 29-30, Joint App. 9]

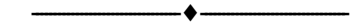
The State moved to dismiss the complaint, arguing that the bankruptcy court did not have jurisdiction over TSAC based on its sovereign immunity as a state agency. Following a hearing, the bankruptcy court denied the State's motion. The bankruptcy court found that TSAC was a state agency entitled to assert the protection of sovereign immunity under the Eleventh Amendment, but that Congress validly abrogated that immunity when it enacted 11 U.S.C. § 106(a). The bankruptcy court based its decision on both the presumption of constitutionality of the statute and on the need for uniformity in application of the bankruptcy laws. [Pet. App. 65, 79-80]

The State appealed to the United States Bankruptcy Appellate Panel ("BAP") for the Sixth Circuit, which affirmed the bankruptcy court's decision. The BAP decided that this Court's decisions in *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996), and its progeny did not compel the conclusion that the States enjoyed sovereign immunity in the bankruptcy context both because none of those cases specifically involved bankruptcy and because none of the laws at issue in those cases were enacted under a clause with a uniformity requirement like that in the Bankruptcy Clause. [Pet. App. 55-59] The panel concluded that the States ceded their sovereignty over the bankruptcy discharge as a part of the plan of the Constitutional Convention and that, where there is no sovereignty, there can be no sovereign immunity. [Pet. App. 60]

On the State's appeal, the court of appeals affirmed the decision for essentially the same reasons as stated by the BAP. The court ruled that Congress validly abrogated the States' sovereign immunity through the exercise of its power under the Bankruptcy Clause, U.S. CONST. art. I, § 8, cl. 4, because the States, in ratifying that provision, had already agreed to surrender their immunity with respect to bankruptcy laws. [Pet. App. 17-21]

In reaching this decision, which essentially followed without citing the rationale of the dissent in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), and the plurality of *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), the court relied on its own interpretation of *The Federalist Papers*, notably Nos. 32 and 81 (Alexander Hamilton). Although noting that this Court had relied heavily on *Federalist* No. 81 in *Seminole Tribe*, the court of appeals apparently concluded that this Court had overlooked a key portion of *Federalist* No. 81, and its relationship to

Federalist No. 32. Based on its reading of those two essays, the court found that there was "no other" conclusion than that there had been a waiver of the States' immunity "in the plan of the convention" with respect to bankruptcy cases when the States granted Congress power to make uniform laws on the subject. [Pet. App. 19]



SUMMARY OF THE ARGUMENT

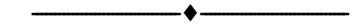
The decision in this case is squarely controlled by this Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), which held that Congress could not use *any* Article I power to create private rights of action to enforce legislation enacted under those powers. Both the majority and the dissent in *Seminole Tribe* specifically referred to bankruptcy as an Article I power that would be subject to the holdings in the case. *Id.* at 73 n.16 and at 77 n.1 (Stevens, J., dissenting).

The court below refused to follow that precedent, relying on a single paragraph in *The Federalist Papers* that it concluded could only be interpreted as meaning that the States had fully ceded their sovereign immunity with respect to bankruptcy at the time they ratified the Constitution. That argument, however, contrary to the Sixth Circuit's view, was not newly discovered, has already been presented to this Court in great detail, and was not accepted when first raised almost twenty years ago. Moreover, even if the Court were writing on a blank slate, the Sixth Circuit's analysis is logically and factually unsupportable.

The court below's rejection of the supporting evidence proffered by the State with respect to the understanding of

the Constitution during the ratification debates stands the method of analysis used by this Court for more than a hundred years, since *Hans v. Louisiana*, 134 U.S. 1 (1890), on its head. Requiring the State to show affirmatively that bankruptcy was specifically raised during the debates, rather than placing the burden on the private party to show that private suits in bankruptcy cases were not "anomalous and unheard of" at the time of the Constitution (*Id.* at 18) reverses the method of analysis that this Court has adopted. And, in any event, the available evidence does show that there was no established pattern of federally-authorized suits against States much less "compelling evidence" that such suits existed as required by *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781 (1991). To the contrary, no bankruptcy laws before 1978 (including during the pre-Revolutionary period under English law) even attempted to abrogate state immunity or to challenge the Eleventh Amendment's application to bankruptcy. As such, the present language in 11 U.S.C. § 106(a) plainly attempts to authorize the type of "anomalous" proceedings that this Court has repeatedly barred.

Finally, there are no other reasons for distinguishing the Bankruptcy Code from other Article I powers or for refusing to apply this Court's existing immunity jurisprudence. Accordingly, the State respectfully requests that the decision below be reversed, and the Debtor's complaint against the State in bankruptcy court be dismissed.



ARGUMENT

I. CONGRESS DOES NOT HAVE THE POWER TO ABROGATE STATE IMMUNITY WITH RESPECT TO BANKRUPTCY.

A. Article I Does Not Give Congress the Power to Abrogate State Sovereign Immunity.

The powers allocated to Congress by Article I of the Constitution to legislate on the topics specified therein do not include the power to create private rights of action against unconsenting States to enforce those laws and powers, or to delegate the power of the United States to enforce those laws against the State. This is based in part on the literal words of the Eleventh Amendment. *Seminole Tribe,* 517 U.S. at 54. More fundamentally, though, the States' immunity from private-party suits is based on the precepts that "each State is a sovereign entity in our federal system," and that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*." *Id*.; *Hans*, 134 U.S. at 13; FEDERALIST No. 81, at 548 (Alexander Hamilton) (J. Cooke ed. 1961) (emphasis in original). That principle of retained state sovereign immunity, as precedent to the Eleventh Amendment and a core component of the fundamental constitutional structure, was first announced in *Hans*, 134 U.S. at 13, and has been the foundation of this Court's jurisprudence on sovereign immunity ever since. Suits by a State's own citizens are barred, despite the literal terms of the Eleventh Amendment, "because of the fundamental rule of which the amendment is but an exemplification." *In re New York*, 256 U.S. 490, 497 (1921).

Because retained state immunity fundamentally limits both Article I and Article III, Congress may not use

its Article I powers to abolish that immunity, regardless of the breadth of those powers.

> [T]he background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.

Seminole Tribe, 517 U.S. at 72-73.

By confirming that state sovereign immunity remains intact even where the Constitution grants the Federal Government "exclusive control" and "complete lawmaking authority," the Court made clear that legislative authority, on the one hand, and immunity from private-party suits, on the other hand, are distinct rights of sovereignty. To cede the former is not to yield the latter.

> The Constitution, by delegating to Congress the power to establish the supreme law of the land when acting within its enumerated powers, does not foreclose a State from asserting immunity to claims arising under federal law merely because that law derives not from the State itself but from the national power. . . . We reject any contention that substantive federal law by its own

> force necessarily overrides the sovereign immunity of the States.

Alden v. Maine, 527 U.S. 706, 732 (1999).

Since *Seminole Tribe*, the Court has emphasized in increasingly unequivocal and unambiguous terms that none of Congress' Article I powers, however "exclusive" or "complete," and specifically including the Bankruptcy Clause, authorize abrogation of the States' immunity from private-party suits. *See Seminole Tribe*, at 72-73 n.16 and at 77 n.1 (Stevens, J., dissenting). In *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 80 (2000), the Court held that "Congress' powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals" in a suit under the ADEA, which was enacted under the Commerce Clause. *Accord*, *Federal Maritime Comm'n v. South Carolina State Ports Auth.,* 535 U.S. 743, 760-761 (2002) (Commerce Clause – maritime); *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 364 (2001) (Commerce Clause – ADA Title I); *Alden*, 527 U.S. at 712, 733 (Commerce Clause – FLSA); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 527 U.S. 666, 669-670 (1999) (Patent Clause – Trademark Remedy Act); *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 527 U.S. 627, 636 (1999) (Patent Clause; Commerce Clause).

B. Bankruptcy Is an Article I Power And Cannot Authorize Congress to Abrogate State Immunity.

Seminole Tribe involved an exercise of congressional power under the Indian Commerce Clause, which is perhaps the "most plenary" federal power in the Constitution, in that

the Indian Commerce Clause divests the States of "virtually all authority over Indian commerce," while under the Interstate Commerce Clause States may still exercise some authority. *Seminole Tribe,* 517 U.S. at 62. The Court overruled its short-lived decision in *Union Gas,* 491 U.S. 1 (which had found congressional power to abrogate under the Interstate Commerce Clause) and held that Congress could *not* abrogate state immunity even under the ultra-plenary Indian Commerce Clause power. *Seminole Tribe*, 517 U.S. at 66. Necessarily, any Article I power (such as bankruptcy) that gives Congress no broader powers can have no greater effect on state immunity.

1. The Commerce Clause was intended to deal with one of the country's most critical problems.

The Commerce Clause is "one of the most prolific sources of national power and an equally prolific source of conflict with the legislation of the state." *Hughes v. Oklahoma*, 441 U.S. 322, 326 n.2 (1979), *quoting H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 534 (1949). The lack of a federal commerce power was a major failing of the Articles of Confederation, and an "immediate cause that led to the forming of a [constitutional] convention." *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.,* 520 U.S. 564, 571 (1997), *quoting Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 224 (1824) (Johnson, J., concurring in judgment); *Hughes*, 441 U.S. at 325.

> The want of a power to regulate commerce is by all parties allowed to be of the number [of defects in the federal system under the Articles of Confederation]. . . . It is indeed evident, on the most superficial view, that there is no object either as

> it respects the interests of trade or finance that more strongly demands a Federal superintendence.

FEDERALIST, No. 22, at 135-136 (Alexander Hamilton). Madison likewise argued that without such power "the great and essential power of regulating foreign commerce" would be "incompleat, and ineffectual." FEDERALIST No. 42, at 283 (James Madison). Indeed, "[n]o other federal power was so universally assumed to be necessary, no other state power was so readily relinquished." *H.P. Hood*, 336 U.S. at 534.

Accordingly, the Court has historically interpreted the Commerce Clause as both an affirmative grant of power to Congress, and a "dormant" or "negative" limit on the power of the States even in the absence of federal legislation. *Camps Newfound,* 520 U.S. at 571; *Hughes*, 441 U.S. at 326; *West Lynn Creamery, Inc. v. Healy,* 512 U.S. 186, 193 n.9 (1994). Madison wrote that the Commerce Clause "was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government." 3 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, p. 478 (1911).

2. The Bankruptcy Clause gives Congress no greater power than the Commerce Clause, and is equally controlled by *Seminole Tribe*.

Compared to the broad scope of Commerce Clause power, the significance of the Bankruptcy Clause was far more limited. While the need for federal power over interstate commerce was one of the main issues giving rise

to the Constitutional Convention, the subject of bankruptcy only arose after the Convention had been in session for three months, and some two weeks before it ended. On August 29, 1787, Charles Pinckney of South Carolina proposed to add to the Full Faith and Credit Clause, a provision allowing Congress "[t]o establish uniform laws upon the subject of bankruptcies, and respecting the damages arising on the protest of foreign bills of exchange." NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON, p. 546 (A. Koch ed. 1987). The bankruptcy language was approved a few days later with little discussion, and with only a single dissenting vote. *Id.* at 569, 571. Such is the entire recorded history of discussion of bankruptcy at the Convention.

Similarly, in the eighty-five *Federalist Papers*, bankruptcy is mentioned but once, in a single, offhand sentence contained in an essay cataloguing miscellaneous inoffensive provisions.

> The power of establishing uniform laws of bankruptcy, is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question.

FEDERALIST No. 42, at 287 (James Madison). The record strongly suggests that the bankruptcy power was seen as merely an adjunct to the main powers given to Congress by the Commerce Clause (and it appears directly thereafter in Article I.) Nothing suggests that it was viewed as more important than the Commerce Clause, or that Congress was given greater powers in that regard than with respect to the Commerce Clause.

Moreover, there is no corresponding "dormant" or "negative" aspect to the Bankruptcy Clause, unlike the Commerce Clause. If Congress has not exercised its power to pass uniform laws on bankruptcy, States retain the power to enact bankrupt laws, so long as they do not violate the Contracts Clause of U.S. CONST. art. I, § 10. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 196-197 (1819). The mere existence of the bankruptcy power, if unexercised by Congress, does not preempt state action on the subject. *Id.*; *Brown v. Smart*, 145 U.S. 454, 457 (1892). Indeed, in the absence of federal laws, States could even discharge debts, so long as the discharge was properly limited in time and geographic scope. *Ogden v. Saunders,* 25 U.S. (12 Wheat.) 213 (1827).

The power transferred to the Federal Government by the Bankruptcy Clause is thus far more limited than the federal power over interstate commerce. If, as *Seminole Tribe* and its progeny have repeatedly held, Congress lacks the authority under even the "most plenary" Article I powers that it possesses, then, *a fortiori*, Congress does not have the authority to abrogate state immunity under the bankruptcy power.

3. This Court has already indicated that it views *Seminole Tribe* as applicable in bankruptcy.

Any question about the applicability of *Seminole Tribe* in bankruptcy cases should have been laid to rest by the decision itself and this Court's subsequent actions. In footnote 16 of the decision, the Court responded to the dissent's concerns as to how the decision would affect various areas of federal law – including bankruptcy. It noted that it had never held that state immunity could be

abrogated under the bankruptcy provisions, and noted a number of alternative ways in which the supremacy of federal law could be ensured. To underscore that explicit statement, the Court soon after granted certiorari in *In re Merchant's Grain*, 59 F. 3d 630 (7th Cir. 1995), which had held that Congress *could* abrogate state immunity under § 106(a) of the Bankruptcy Code. This Court vacated the decision, and remanded it for reconsideration in light of *Seminole Tribe*. *Ohio Agricultural Commodity Depositors Fund v. Mahern*, 517 U.S. 1130 (1996).[2]

II. THE STATES DID NOT CEDE THEIR IMMUNITY FROM SUIT IN BANKRUPTCY

In light of the unequivocal holdings of this Court in *Seminole Tribe* and its progeny, and, particularly the explicit statements by both the majority and the dissent that the decision was expected to apply in bankruptcy, 11 U.S.C. § 106(a) would plainly appear to be unconstitutional, since it flatly states that it is an abrogation provision. Five circuit courts have so held with little difficulty.[3]

[2] The underlying facts of the case resulted in the suit against the State becoming moot before the Seventh Circuit had occasion to apply the Court's directive. However, that circuit has since ruled on the issue and held in *Nelson v. La Crosse County Dist. Atty.*, 301 F.3d 820 (7th Cir. 2002), that *Seminole Tribe* does apply in bankruptcy.

[3] *Nelson*, 301 F.3d at 832 (7th Cir. 2002); *Mitchell v. Franchise Tax Bd. of California* (*In re Mitchell*), 209 F.3d 1111, 1121 (9th Cir. 2000); *Sacred Heart Hosp. of Norristown v. Pennsylvania* (*In re Sacred Heart Hosp. of Norristown*), 133 F.3d 237, 243 (3d Cir. 1998); *Fernandez v. PNL Asset Mgmt. Co.* (*In re Fernandez*), 123 F.3d 241, 243 (5th Cir.), *amended by* 130 F.3d 1138, 1139 (5th Cir. 1997); *Schlossberg v. Maryland* (*In re Creative Goldsmiths of Washington, D.C., Inc.*), 119 F.3d 1140, 1145-46 (4th Cir. 1997), *cert. denied*, 523 U.S. 1075 (1998).

The Sixth Circuit, alone, held that it need not apply *Seminole Tribe* literally, based on its conclusion that this Court had overlooked a crucial issue, arising from the interaction between *Federalist* Nos. 81 and 32. Relying on this purportedly new found issue, the Sixth Circuit concluded that *Seminole Tribe* did not apply in bankruptcy after all.

In reality, though, the argument that the Sixth Circuit "discovered" had, in fact, already been thoroughly aired before this Court almost twenty years ago. It failed to convince the Court then, and it has not become more compelling in the years since. As set forth below, the Sixth Circuit's arguments are factually, legally, and logically without merit.

A. *The Federalist Papers* Do Not Demonstrate That the States Ceded Their Immunity.

The Sixth Circuit's argument [Pet. App. 8] proceeds as follows. In *Federalist* No. 81 at 541, Alexander Hamilton begins his famous discussion about sovereign immunity in order to respond to criticisms that the new Constitution could alter or abolish the States' judicial immunity from private suits for debts owned by the States. Hamilton seeks to reassure the States by noting that it is "inherent in the nature of sovereignty" for a State to be immune from suits by private persons without its consent and, as "one of the attributes of sovereignty," that immunity could not be abolished unless there were a surrender thereof in the "plan of the convention." *Id.* at 548-549. He then notes that in his earlier article on taxation (which is generally taken as referring to *Federalist* No. 32), he had discussed how States could alienate their sovereignty. That essay

contains a discussion of legislative issues and the various ways in which preemption of state law by federal enactments could occur.

One such principle is where the federal government is granted an authority "to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*." *Id.* at 200 (emphasis in original). As an example, Hamilton refers to the power to establish "an uniform rule of naturalization." The Sixth Circuit analysis then equates bankruptcy with this reference to naturalization (because both are in the same clause and use the word "uniform") and concludes that this is an area in which the federal government must exercise complete power. The final leap of logic is to move from this discussion of legislative supremacy back to No. 81, and to conclude that Hamilton's cross-reference to No. 32 was meant to indicate that if the States' legislative sovereignty was "alienated" there, then by the same token, so too was their sovereign immunity with respect to that power. Indeed, the court held that there was "no other explanation" for the linkage between Nos. 81 and 32, but for this equation of the waiver of legislative and judicial sovereignty, and, hence, concluded that the States had waived their immunity with respect to bankruptcy. [Pet. App. 19]

Although the Sixth Circuit did not discuss any of the other aspects of No. 32, its ready equation of the cession of legislative authority in that article with the waiver of judicial immunity being discussed in No. 81 logically means that this same principle applies to any of the other forms of legislative preemption discussed in No. 32. While the scope of cession to federal authority might be less, there would be no reason to treat the ability to abrogate

within that authority any differently. Thus, Congress could abrogate to the same extent it can legislate.

1. This Court has already declined to adopt this analysis.

In fact, the very argument accepted by the Sixth Circuit has already been made to this Court in its full scope and breadth. In *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), it was a primary focus of the 55-page dissent which mounted a frontal assault on the broad view of immunity that had been espoused in *Hans* and its progeny. The opinion traced the same steps from *Federalist* Nos. 81 to No. 32 and argued for the same conclusion in its fullest most logical form. The dissent's conclusion was that "[i]n these areas, in which the Federal Government had substantive lawmaking authority, Article III's federal-question grant of jurisdiction gave the federal courts power that extended just as far as the legislative power of Congress." *Id.*, 473 U.S. at 277-78. That argument, though, did not carry the day in *Atascadero*.

In *Union Gas*, the four-member plurality again took the same view, asserting that there was no need to prove that a State consented to suit in a particular case because "they gave their consent all at once, in ratifying the Constitution containing the Commerce Clause." 491 U.S. at 20. That view when joined to the cryptic, one-sentence concurrence of Justice White governed for seven years, but it was definitively rejected in *Seminole Tribe* and cannot serve to validate the Sixth Circuit's position in the decision below. The Sixth Circuit neither mentioned nor distinguished the decisions and analysis in *Atascadero* and *Union Gas,* and it provides no new insights that were not

already raised in the more detailed opinions in those cases. *Seminole Tribe*'s categorical rejection of the attempt to equate legislative and judicial sovereignty is dispositive of this case.

2. Even if considered de novo, the analysis is without merit.

While this Court did not adopt the dissent's arguments in *Atascadero*, it did not engage in a point-by-point rebuttal of that specific part of the argument. But, even if examined de novo, the Sixth Circuit's analysis fails for both legal and factual reasons and cannot override the effect of *Seminole Tribe* upon bankruptcy.

a. The argument, if accepted, would overrule *Seminole Tribe*.

As noted above, the first critical problem with the argument is that, followed to its logical conclusion, it is wholly incompatible with *Seminole Tribe*. The Sixth Circuit only discusses the issue as to bankruptcy and the supposed exclusivity of federal power therein. But, as the dissent in the *Atascadero* decision makes clear, the logic of this analysis extends the scope of Congress' power to the same extent as its power to legislate. Such a result is diametrically opposed to the holding in *Seminole Tribe*. The dissent's rationale in *Atascadero* (and its descendant, *Union Gas*) say that *all* Article I powers can give Congress the power to abrogate immunity; *Seminole Tribe* and its progeny say that *no* Article I powers have that effect. The two analyses are flatly inconsistent and the decision below fails on this basis alone.

b. The Sixth Circuit's interpretation of the relationship between *Federalist* Nos. 81 and 32 is illogical.

Even if this Court had not already resolved this issue in *Seminole Tribe*, the analysis below would not make sense. The Sixth Circuit's position relies on a dual inference – that Hamilton viewed both legislative sovereignty and judicial sovereign immunity as parts of a single, undifferentiated concept of "sovereignty" and that his discussion of the limitations of States' legislative sovereignty in No. 32 was meant to impose a concomitant limitation on their sovereign immunity in No. 81. Those conclusions, though, make little sense in the context of the discussion in No. 81. As noted above, this discussion was to *reassure* those who had doubts about the protections afforded state sovereign immunity under the Constitution. A discussion that referred them to the broad set of circumstances in which federal legislative power could trump state actions and then concluded that, in all of those areas, federal laws could abolish state immunity would hardly have had the desired soothing effect. To the contrary, it would likely have further inflamed those fears.

After the cross-reference to *Federalist* No. 32, Hamilton returned to his discussion by saying that "there is no colour to pretend" that States would be subject to any constraint, *i.e.*, private litigation, with respect to enforcing payment of their debts. He more likely, therefore, expected his words to be taken as giving the required reassurance by *contrasting*, not *equating*, the effects of legislative and judicial power on various aspects of state sovereignty. Plainly, then, and contrary to the Sixth Circuit's view that its inference is the "*only*" one that can be drawn from

those words, the most logical inference is exactly the contrary.

c. The uniformity requirement for bankruptcy laws does not require a different conclusion.

The Sixth Circuit's decision places a talismanic significance upon the reference to "uniform" laws of bankruptcy that does not hold up upon further examination. First, and most simplistically, the reference to "uniformity" allows the court to treat bankruptcy as having been dealt with in No. 32, when that essay actually referred only to uniformity regarding naturalization. Second, it is apparently meant to convey the impression that bankruptcy is a matter uniquely within federal control. Third, it apparently also seeks to suggest that it would be improper or indeed forbidden to have a bankruptcy law that treated States differently from other parties. Fourth, the reference could be taken to mean that there is such a strong federal interest in having the legislative provisions enforced that this interest can control over States' sovereign immunity. None of these arguments withstands closer examination.

(i) Bankruptcy and naturalization laws are not readily equated.

Despite their common use of the word "uniform," bankruptcy and naturalization laws otherwise have little in common. Once there was a truly functioning federal government, it was logically the *only* entity that could decide who would become a *national* citizen and that process would surely involve national standards. *See*

FEDERALIST No. 42, at 285-287 (James Madison). That process would be largely administrative though and did not need to involve the States as potential parties at all. Certainly, it would be hard to imagine an instance in which a suit against a State would arise under the naturalization laws (and such cases cannot readily be found in a search of the existing precedents).

The inclusion of bankruptcy in the same clause, though, did not mean that the Framers assumed the two clauses were to have equal effects. Madison described naturalization and bankruptcy as distinctly different issues. FEDERALIST No. 42, at 285-287 (James Madison). Madison described at some length the present difficulties when States each defined citizenship in their own ways and could force other States to accept those persons as citizens under their laws. *Id.* at 286. Such conundrums required a uniform rule of naturalization which only Congress could prescribe. *Id.* at 285-287. That discussion, though, did not include any reference to the need to abrogate state immunity.

In contrast to that detailed treatment of naturalization, Madison, as noted above, wrote only one sentence about bankruptcy. In light of the far greater concerns about how to deal with the problems of naturalization and the stricter rule they would require, it is not surprising that when Hamilton gave an example of exclusive lawmaking authority, as to which the reservation of authority in the States would be "absolutely and totally *contradictory* and *repugnant,*" he referred only to the Naturalization Clause, and not the Bankruptcy Clause, as well. FEDERALIST No. 32, at 200 (emphasis in original). The lower court's assumption that the same reasoning that applies to the

Naturalization Clause also necessarily embraces the Bankruptcy Clause is simply unwarranted.

(ii) The fact that a law must be "uniform" does not provide any greater federal authority than other Article I powers.

The reference to "uniformity" is also presumably meant to show that Congress must have "complete" or "exclusive" authority to make laws in regards to that subject, or else there would not be a single, "uniform" law. Yet, unless one equates broad federal legislative authority with an equally broad federal right to abrogate immunity, this argument is simply a non sequitur. Leaving aside the residual state legislative authority that exists with respect to insolvency,[4] the lack of state legislative authority (or, conversely, the breadth of federal authority) is irrelevant under *Seminole Tribe*. No matter how complete or exclusive – or "uniform" – the Article I lawmaking powers, they do not override state sovereign immunity, unless *Seminole Tribe*, *Alden*, *et al*., are themselves to be overridden. The court below cannot avoid the impact of *Seminole Tribe* by simply recasting a discussion about "plenary" powers into one about "uniform" powers.

[4] Indeed, even when Congress has exercised its power by passing a bankruptcy act, state laws in the field of insolvency are suspended only to the extent they actually conflict with the federal law. *Stellwagen v. Clum*, 245 U.S. 605, 613, 615 (1918).

(iii) The "uniformity" requirement has a limited meaning and does not mean that the States must be treated like all other parties.

The Sixth Circuit further suggests that the uniformity requirement has substantive significance that goes beyond a mere requirement for geographic uniformity. That argument is unsupported by any precedent and flies in the face of the many, demonstrated ways in which the Bankruptcy Code does *not* treat all debtors, all creditors, or all claims in the same ways. On an objective analysis, the Bankruptcy Code is not nearly as "uniform" as a literal reading of that word might suggest.

This Court has never held that the uniformity requirement extends beyond geographic uniformity or a bar on enactment of special legislation to protect only a single debtor.[5] Geographic uniformity was referenced in *Vanston Bondholders Protective Committee v. Green,* 329 U.S. 156, 172-173 (1946) (Frankfurter, J., concurring) citing *Hanover National Bank of the City of N.Y. v. Moyses*, 186 U.S. 181, 190 (1902). The *Railway Labor Executives* case is the only time the Court has found that a law violated the special purpose bar because it provided relief to one, and

[5] In *Railway Labor Executives' Ass'n v. Gibbons,* 455 U.S. 457, 472 (1982), the Court noted that, prior to the Constitution, States had passed many private acts to give discharges to individual debtors in the absence of general laws providing such relief. It was unclear whether such relief would be recognized in other states, which was the reason bankruptcy arose in the discussion about the Full Faith and Credit Clause. The uniformity requirement was included both to bar such private bills and to make them unnecessary by enacting laws applicable to all. *Id.* at 472-473.

only one debtor. 455 U.S. at 469. Thus, uniformity is at most a highly flexible limit on the nature of bankruptcy laws that Congress may pass. As such, it can hardly prove that bankruptcy is a uniquely powerful federal power.[6]

This reality – that bankruptcy law is not fully dictated by *federal* law, nor, indeed, overly uniform – can be easily demonstrated. A bankruptcy law may be "uniform" even though it incorporates state law so that there are different results in different States. *Railway Labor,* 455 U.S. at 469; *Stellwagen v. Clum,* 245 U.S. 605, 613 (1918); *Hanover Bank*, 186 U.S. at 190 (bankruptcy trustee may "uniformly" take whatever property is available to creditors under relevant state law, even though this may have vastly different results in different States.)

Similarly, the current Bankruptcy Code uses state law to determine what are the "property" rights that go *into* the "property of the estate." *Butner v. United States*, 440 U.S. 48, 54 (1979). And, under 11 U.S.C. § 522(b), state law

[6] Indeed, it is difficult to see why a requirement that laws be "uniform" would be any sign of greater federal power. To the contrary, this would seem to be a limit on federal discretion that does not exist for the Commerce Clause, for instance. *Railway Labor,* 455 U.S. at 468 (uniformity provision is "an affirmative limitation or restriction upon Congress' power" unlike the Commerce Clause); *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U.S. 604, 616 (1950). Thus, if the federal government uses Commerce Clause powers to assist impoverished fisherman in Alaska or farmers in Iowa, it is not equally obligated to assist needy fisherman in Massachusetts or farmers in Mississippi. A robust enforcement of the uniformity clause, though, could limit many of the Code's provisions enacted to deal with the special concerns and problems of a segment of debtors or creditors. Thus, this requirement plainly provides Congress with no greater power than the Commerce Clause and could indeed limit Congressional enactments had it not been interpreted in its current narrow scope.

may require – to the total exclusion of federal law – that their laws decide what comes *out of* the estate as exemptions.[7] The "basic federal rule" in bankruptcy is that state law governs the substance of claims and the burden of proof required. *Raleigh v. Illinois Department of Revenue*, 530 U.S. 15, 20 (2000) (citing *Butner*, 440 U.S. at 57 (1979)); 11 U.S.C. § 502(b)(1). Similarly, the determination of property rights in the assets of the estate are made under state law. *Raleigh*, *id.* (citing *Butner*, 440 U.S. at 54 (footnote omitted in original)). And, finally, the Bankruptcy Code does not create a federal right of setoff, but, instead, generally preserves existing setoff rights created under state law, in 11 U.S.C. § 553(a). *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 18 (1995). These are but a mere sampling – bankruptcy law is permeated in every aspect with state law considerations, rather than being a system rigidly dictated solely by federal law.

Nor does the uniformity provision forbid Congress to distinguish between different classes of debtors, different industries, or different creditors. *Railway Labor*, 455 U.S. at 469 ("The uniformity requirement of the Bankruptcy Clause is not an Equal Protection Clause for bankrupts.") *Id.* at 471 n.11. Certain entities, such as insurance companies and most banks are not permitted to file for bankruptcy protection. 11 U.S.C. § 109(b)(2). There are special chapters

[7] State laws can vary widely and result in great disparity. Under Tennessee law, the homestead exemption may not exceed $5,000 for an individual or $7,500 for an individual and their spouse. TENN. CODE ANN. § 26-2-301(a). Under Florida law, the homestead exemption is unlimited in amount. FLA. CONST. art. X, § 4.

for family farmers, 11 U.S.C. § 1201 *et seq*., and municipalities 11 U.S.C. § 901 *et seq*., and railroads are not permitted to file under Chapter 7, but may file under Chapter 11. 11 U.S.C. § 109(b)(1) and (d).

Further, there are many areas in which the Code treats governmental units differently than other creditors. Taxes, for instance, receive priority under § 507(a)(8), but tax liens can be subordinated to priority creditors in § 724(b) and, under § 505, debtors have special rights to relitigate tax claims – even those on which they defaulted prepetition. Similarly, there is a police and regulatory exception in § 362(b)(4) to the portion of the automatic stay set out in § 362(a), but governmental entities are subject to special anti-discrimination provisions in § 525 to which there is no police and regulatory exception. *Federal Communications Comm'n v. Nextwave Personal Communications, Inc*., 537 U.S. 293, 302 (2003). And, as pertains to this case, Congress has repeatedly tightened the limits on when debtors may discharge student loans that were "made, insured or guaranteed by a governmental unit." 11 U.S.C. § 523(a)(8).

In sum, the uniformity provision of the Bankruptcy Clause does not automatically preempt the entire field of bankruptcy, does not nullify all state laws on the subject, does not require that identical laws governing debtor-creditor relationships must apply in every State, and does not require Congress to treat all classes of debtors, creditors, or debts the same. To suggest that the uniformity requirement therefore confers exclusive power upon Congress to establish a perfectly uniform system of bankruptcy law at the expense of all rights of state sovereignty

is to indulge a literalism wholly at odds with constitutional intent and with experience. A bankruptcy system which uniformly observes the sovereign immunity of the States from private-party suits is nonetheless constitutionally uniform. And, in the light of that well-established law and fact, the Sixth Circuit's attempt to use the uniformity requirement as a way to accord a unique status that overrides the holding in *Seminole Tribe* cannot withstand scrutiny.

(iv) This Court has rejected the argument that "uniformity" of federal regulation has independent constitutional significance.

Finally, even if the Bankruptcy Clause did require strict, literal uniformity, however, such federal power would not eliminate the States' immunity from private actions. The Patent Clause, for instance, by both its terms and its nature demands a uniform system of exclusively federal law to secure for "authors and inventors the *exclusive* right to their respective writings and discoveries." U.S. CONST. art. I, § 8, cl. 8. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 151-152 (1989) (state laws may not provide independent system of patent protection; federal law preempts the field). Yet, the Court has already held that, despite the need for uniformity, Article I of the Constitution did not divest the States of immunity from private-party suits in the areas of patent and trademark law. *College Savings Bank*, 527 U.S. at 669-670; *Florida Prepaid,* 527 U.S. at 636.

The Court rejected the argument that, "[t]he constitutional necessity of uniformity in the regulation of maritime commerce" overrides the States' legislative sovereignty in

the face of the Federal Government's regulatory authority on that subject. *Federal Maritime Comm'n,* 535 U.S. at 767. *Seminole Tribe*, however, precludes creation of a new "maritime commerce" exception to the States' judicial sovereign immunity. *Id.* The arguments are no stronger here for the conclusion that the "uniformity" requirement in the Bankruptcy Clause is sufficient to override the States' retained sovereign immunity.

This Court has previously held that there must be "compelling evidence" of an intention to override the States' immunity in the "plan of the Convention" in order to justify a finding that Congress has the power to do so. *Blatchford*, 501 U.S. at 781; *Alden*, 527 U.S. at 731, 741. If such evidence does not exist, and the suits would have been "anomalous and unheard of" at the time of the Constitution, *Hans*, 134 U.S. at 18; *Alden*, 527 U.S. at 727, then there can be no finding that the States waived their immunity so as to allow Congress to abrogate it by legislative action.

There is no principled legal or factual basis for treating the Bankruptcy Clause any differently than the Commerce Clause, the Patent Clause, or other Article I powers. *Seminole Tribe*, 517 U.S. at 72 n.16, and 517 U.S. at 77 n.1 (Stevens, J., dissenting). The States retain their inherent sovereign immunity from private-party suits in the field of bankruptcy.

III. SOVEREIGN IMMUNITY DOES NOT FORECLOSE ALL RELIEF TO A BANKRUPT STUDENT LOAN DEBTOR.

By asserting its sovereign immunity, the State of Tennessee by no means contends that it is free to disregard the

bankruptcy laws of the United States. Sovereign immunity from suit does not confer a right to disobey valid federal law. "The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design." *Alden*, 527 U.S. at 755. This Court has expressed unwillingness to assume that the States and their courts will refuse to honor the federal Constitution and laws. *Id.*

The Court has noted that, without offending the States' sovereign immunity from private-party suits, there are other methods of ensuring state compliance with federal law, with varying methods applicable to different problems. *Seminole Tribe*, 517 U.S. at 71 n.14. For example, an enforcement suit might be brought by the Federal Government itself against a State; or an individual might sue a state officer for prospective relief from an ongoing violation under the doctrine of *Ex parte Young,* 209 U.S. 123 (1908).

In the specific context of the present case, the Debtor seeks discharge from a student loan debt which is presumptively nondischargeable under the applicable federal statute. 11 U.S.C. § 523(a)(8).[8] Discharge of such a debt is only obtainable upon a showing of "undue hardship" to the debtor and her dependents. *Id.* Such an issue is not peculiarly a bankruptcy issue, however. It has nothing

[8] The debtor may also directly contact TSAC and arrange a payment plan or apply to obtain a grant to release the loan in conformity with the rules and regulations applicable to TSAC. 34 C.F.R. § 682.100 *et seq*. (2003); TENN. COMP. R. & REGS. 1640-1-2 *et seq*. (2003) (Guaranteed Student Loan Program).

whatsoever to do with the validity of the debt or the priority of the debt, and is unrelated to any issues such as the distribution of assets of the bankrupt estate. There is no compelling reason requiring the question of "undue hardship" in this context to be decided by a federal bankruptcy judge. The appropriate and fully adequate remedy for a debtor seeking a discharge under 11 U.S.C. § 523(a)(8) is to raise the issue of "undue hardship" as a defense in any collection action that might be brought by the state creditor in state court. An adjudication in that setting, ultimately reviewable by this Court as a federal question, would balance the debtor's interest, the general interest in honoring the federal law, and the fundamental, inherent sovereign immunity of the State.

———♦———

CONCLUSION

For the reasons stated, the decision of the court of appeals should be reversed, and the Debtor's complaint against the State in bankruptcy court should be dismissed.

Respectfully submitted,

PAUL G. SUMMERS
Attorney General & Reporter
for the State of Tennessee

MICHAEL E. MOORE
Solicitor General

DARYL J. BRAND
Associate Solicitor General
Counsel of Record

CYNTHIA E. KINSER
Deputy Attorney General

MARVIN E. CLEMENTS, JR.
Senior Counsel
P.O. Box 20207
Nashville, TN 37202-0207
(615) 253-3327

Counsel for Petitioner, Tennessee Student Assistance Corporation